IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 2265 of 2007
With
CRIMINAL MISC.APPLICATION No. 2270 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARVIND PANDALAI (CHAIRMAN CUM-MANAG.DIRECTOR) S.T.C.I.L. & 1 - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR R.K.ANAND, SR.ADV WITH MR. MANISH R BHATTWITH MISS SHIVANI WITH MISS MAUNA BHATT for Applicant(s) : 1 - 2.
MR.A.Y.KOGJE, A.P.P. for Respondent(s) : 1,
MR KJ SHETHNA, sR.COUNSEL WITH MR.HARSHT S.TOLIA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE MD SHAH

Date : 19/06/2007

CAV JUDGMENT

1. These applications under Section 482 of the Code of Criminal Procedure, 1973 are preferred by the petitioners of both these applications with a prayer to quash and set aside the complaint bearing FIR no.619 of 2005 lodged at A- Division Police Station, Bhavnagar, by the respondent no.-2 –Arun Kumar Hansraj Jain on 29-9-2006 for the offence punishable under Sections 406, 420, 467 read with Section 120-B and 114 of the Indian Peal Code as also the subsequent proceedings arising therefrom.

1.1 It may be stated that petitioner (accused no.3) of Criminal Misc. Application no.2270 of 2007 is the Branch Manager of State Trading Corporation of India (STC) while the petitioners nos.1 and 2 (accused nos.4 and 5) of Criminal Misc. Application no.2265 of 2007 are the Chairman-cum-Managing Director, and Director (Finance) of the said Corporation and both these applications arise from the same complaint filed by Arun Kumar Hansraj Jain, Chairman-cum Managing Director of Garg Casteels Pvt.Ltd. Since the question involved as also the facts are common in both these petitions, the same are being disposed of by this common judgment.

2. The respondent no.2 –complainant –Arunkumar Hansraj Jain who is the Chairman and Managing Director of Garg Casteels Pvt.Ltd. in his

complaint has alleged that he has been cheated by the accused nos.1 to 5 by using forged documents and misappropriating an amount of Rs.3 crores. It has also been alleged therein that the present accused nos.3-Branch Manager, accused no.4-Chairman-cum-Managing Director, and accused no. 5-Director (Finance) are in charge of the business of the State Trading Corporation (STC) and are completely aware of the day to day business. According to the complainant, he was contacted by the accused no.1 –Rajeev Somani, Chairman and Managing Director of M/s. Samraj Exim India Pvt.Ltd. in February 2006 with an order for exporting 60,000 MT iron ore to China, and was told that a Memorandum of Understanding has been executed with the accused nos.3,4 and 5 (present petitioners) of STC for financial transactions. It is further alleged that the accused no.1 assured him that the export contract will be over in June, 2006 and that the deal would fetch a profit of Rs.150 lakhs and further added that they would provide a bank guarantee of Rs.3 crores to STC for implementation of the contract. It was decided that a minimum profit of Rs.50 lakhs will be paid to the complainant., and therefore, in good faith and on the assurance given by the accused nos.1 and 3, the complainant had got issued two separate bank guarantees of Rs.2.50 crores and Rs.50 lakhs in favour of STC from Punjab National Bank, Raiwai Branch, Opp.Bhid Bhanjan Mahadev, Bhavnagar. It is further alleged in the complaint that the said two bank guarantees were

invoked prior to the expiry period and on inquiry it was found that as per the MOU entered into between the accused no.1 and STC , 60,000 MT of iron ore were exported in the month of June 2006, however, a dispute arose between the accused no.1-Shipping Company and the party in China. According to the complainant on making further inquiries it was learnt that in terms of MOU dated 13-4-2005 the accused nos.3, 4 and 5(present petitioners) had given the value of the goods exported to China in advance to the accused no.1 (SEIPL), however, the accused nos.1, 2, 3, 4 and 5 have entered into a criminal conspiracy and with an intention to cheat the complainant the accused nos 1,2,3,4 and 5 put up a false case before the complainant that for implementation of the aforesaid contract of MOU a bank guarantee is required to be furnished and the complainant in good faith gave two bank guarantees which were invoked prior to the expiry period illegally, even though , in fact,nothing was remaining to be done for the implementation of the contract. and thereby all the accused (including the present accused nos.3, 4 and 5) have committed breach of trust, forgery and misappropriation of funds. Under these circumstances, the complainant had lodged the complaint as referred to in para-1 of this judgment.

2. It is the case of the applicants of both these applications that on 6-11-2004, Mr. Rajeev Somani i.e. the accused no.1 –Chairman and

Managing Director of M/s. Samraj Exim Pvt.Ltd (SEIPL) approached the State Trading Corporation with a proposal for export of iron ore from India to China and the estimated profit for the said deal of export was US $1,20,000. Accordingly, on 18-3-2005 SEIPL had signed a contract with M/s. Creatway Pte.Ltd, Singapore, under which M/s. Creatway Pte.Ltd. was to supply 60,000 MT of iron ore Fines Fe 58% to China. SEIPL had confirmed that the foreign buyer had obtained Letter of Credit in their favour for the shipment of 60,000 M.T of iron ore Fines Fe58% and a Memorandum of Understanding (MOU) was executed between SEIPL and STC on 13-4-2005. According to the petitioners, the above said Letter of Credit was issued on 8-4-2005 and the beneficiary was M/s. Creatway Pte.Ltd., Singapore. That on 14-4-2005 subsequent to the execution of the said MOU on request of M/s.Creatway Pte.Ltd the Letter of Credit was transferred in favour of STC by Overseas Chinese Banking Corporation Ltd. It is further the case of the petitioners that after the first shipment of iron ore on 30-4-2005, again on 14-6-2005, 440007 WMTS of iron Ore Fines Fe 58% valued at US$.18,65,580 was supplied to M/s.Genera Nice Resources, Hongkong, and since at the first delivery STC had realized full export proceeds, this time STC had released 75% of the value of the goods in advance in terms of the MOU in favour of SEIPL and had also agreed to pay Ocean freight separately against securing 10% of the value. However, after the shipment a dispute occurred

between M/s. Createway Pte.Ltd (Charters) and M/s. Arya Shipping(Owners of ship) with regard to payment of Ocean Freight and as the dispute remained unresolved till the ship reached the Chinese Port, the ship owner did not unload the cargo at its destination port and the cargo remained afloat outside the sea port upto 29-7-2005. In the meanwhile, the buyer of the goods (importer) went back and refused to take delivery of the goods on account of the dispute with regard to payment of Ocean Freight. SEIPL then intervened and another buyer M/s. Sinochem Ind., China agreed to purchase the entire goods on condition that they will retain USD 7,25,000/- as the cost of Ocean Freight and that they shall release the same in favour of the party on settlement of the dispute between M/s Creatway Pte.Ltd. and M/s Arya Shipping. Thereafter, SEIPL by their letter dated 29-7-2005 requested the Branch Manager of STC to give an undertaking and permit M/s. Sinochem Ind., China, to retain USD 7,25,000/- and to make the balance payment of the goods. Thereafter, SEIPL had given a bank guarantee of Rs.37,37,000/- apart from the payment of Rs.30,00,000/- and also agreed to give a bank guarantee for the amount equivalent to US$ 7,25,000/- being the disputed Ocean Freight.and so on 29-7-2005, STC agreed to issue letter of confirmation to M/s. Sinochem Ind., China to retain US$ 7,25,000/-. Accordingly, letter of confirmation was issued to M/s. Sinochem Ind., China and M/s. Sinochem Ind.,China retained US$

7,25,000/-, released the balance payment and took delivery of the goods. The dispute with regard to payment of Ocean Freight between M/s Creatway Pte. Ltd. (charters) and M/s. Arya Shipping is pending before the International Arbitrators. According to the petitioners, after repeated demands by STC, SEIPL, as agreed earlier, handed over bank guarantee bearing no.0051LG000606 dated 7-3-2006 for Rs.2.50 crores as also bank guarantee bearing no 0051LG000706 dated 21-3-2006 for Rs.50 lakhs through M/s. Garg Casteels (Pvt.)Ltd for the due performance of the MOU dt.13-4-2005. It is further the case of the petitioners that as SEIPL had failed to make the balance payment of US$ 7,23,000 or equivalent amount as agreed between the parties, STC invoked the bank guarantees on 9-5-2006 for Rs.3 crores. Thereupon, the respondent no.2-complainant- Arun Kumar Hansraj Jain in his capacity as Chairman and Managing Director of M/s. Garg Casteels Pvt.Ltd., who furnished third party bank guarantee in favour of STC lodged complaint being FIR no.619 of 2006 at 'A' Division Police Station, Bhavnagar which is the subject matter of challenge in these Misc.Criminal Applications.

3. Heard Mr. R.K.Anand Sr. Advocate on behalf of Mr. Manish R Bhatt with Miss Shivani with Miss Mauna Bhatt for the petitioner/s, learned A.P.P. Mr. A.Y.Kogje for the respondent no.1-State and learned Advocate Mr. K.J.Shethna, Sr. Counsel with Mr. Harshit S.Tolia, for the respondent no.2- in both these applications.

4. Learned Sr. Advocate Mr. R.K. Anand for the petitioners has submitted oral as well as written submissions. According to the learned Sr. Counsel, the FIR is lodged after four months from the date of encashment of the bank guarantee at Bhavnagar for which no explanation is given by the complainant, and as such, there being no explanation for late filing of the FIR, the complaint is required to quashed. As per the complaint, the complainant came to know about the conspiracy entered into between the accused nos.3,4 and 5 and accused no.1 only after commission of the offence punishable under Secs.406, 420, 467 and 120(B) of IPC, and therefore, on the facts of the case it is difficult to come to the conclusion that the complaint was deliberately filed late by the complainant and that the complaint is liable to be quashed. Even if it is assumed that there is some delay in lodging the complaint before the police, that delay by itself has no vitiating effect on the proceedings because it is not the case of the petitioners that complainant after due deliberation with the third party allowed the real culprits to go scot free and has involved them falsely in the case out of personal vengeance. It is not the case of petitioners that the complaint as filed is barred by law of limitation as per Section 468 of the Criminal Procedure Code. On the ground of so called delay in lodging the complaint, the FIR cannot be quashed.

5. The contention raised by the learned Sr. Counsel that the

ingredients of the offences alleged to have been committed by the petitioners under Sections 406, 420, 467 and 120(B) are not mentioned in the complaint, and therefore, the FIR should be quashed is also devoid of any merit. A bare look at the FIR, more particularly, paragraphs 6 to 13 makes it prima facie clear that the petitioners had entered into conspiracy with other accused for commission of offences punishable under Sections 406, 467, 420 read with Section 120(B). At the stage of considering the question whether an FIR should be quashed or not, what is required to be considered by the Court is whether the ingredients of the offences alleged to have been committed are set out in the FIR. In the present case, the ingredients of the offences alleged to have been committed are precisely set out in the FIR.

6. This Court has gone through the case diary and the entire papers of investigation. It is interesting to note that on 13-4-2005 a contract in the form of a Memorandum of Understanding was entered into between the STC and M/s. Samraj Exim Private Ltd. of which the accused no.1 is Chairman and Managing Director for export of 60,000 Metric Tonnes of iron ore. There was no outer limit fixed of the time period within which the contract was to be executed. In the month of June 2005 iron ore was exported through STC. So, when the iron ore was exported the contract would have come to an end upon its execution. The complainant in the complaint has specifically stated that the accused Rajeev Samani,

Chairman and Managing Director of Samraj Exim Pvt.Ltd had met him and represented that in view of the MOU dated 13-4-2005 iron ore is to be exported and for the same bank guarantees are required to be given. The accused further assured the complainant that there will be a profit of Rs.150 lakhs in the said transaction, out of which, Rs.50 lakhs will be offered to the complainant as his share. The accused also represented that the goods were to be exported in the month of June, 2006. The complainant then met the Branch Manager of STC, Shri Arun Kajla who also confirmed that the goods were to be exported in June 2006 under the said MOU by showing him a letter of credit and further suggesting that if the complainant provides the bank guarantee everything would be in order. It is pertinent to note here that even though the export of iron ore under the aforesaid MOU had already taken place in June, 2005 and the value of the goods exported was given in advance to the accused no.1, neither the accused no.1 nor the STC through its officers had disclosed this fact to the complainant, and therefore, as the contract was dated 13-4-2005 and no outer limit was fixed of the time period for execution of the contract, the complainant had given the bank guarantees under the firm belief that the export was to take place at a future date. Moreover, the records shows that the accused no.1, as Chairman and Managing Director of Samraj Exim Pvt.Ltd. asked for amendments after the first bank guarantee was issued and amendments

were made as per the letter dated 16-3-2006 and this fact has also not been brought to the notice of the complainant who had provided the bank guarantees. Under the circumstances, it can prima facie be said that the accused nos.1,2, 3, 4 and 5 have entered into criminal conspiracy and with an intention to cheat and by making false representations to tbe complainant committed the offences of cheating, breach of trust and misappropriation of funds. Thus, the present petitioners have not come before the Court with clean hands as they have suppressed the material facts. Whosoever comes before the Court with unclean hands cannot get the relief sought for from the Court. There has also been some dispute with regard to payment of ocean freight and arbitration case is also pending. These are all questions of fact which can be decided only at the trial. In the present case, reading the complaint as a whole, it appears on consideration of the allegations in the light of the statement made on oath by the complainant that the ingredients of the offences in question are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious. It is important to note that in this case, fraudulent or dishonest intention is present right at the beginning of the transaction and as such, prima facie, the allegations in the complaint if accepted on its face value constitutes offences as alleged therein.

6. It was next argued by the learned Sr. Advocate that the encashment of the bank guarantee is purely a civil transaction, and

therefore, the FIR should be quashed. This argument cannot be upheld because it is well settled proposition of law that an action of a party may have civil as well as criminal consequence. Therefore, merely because civil consequences may result from the act of a party, one need not jump to the conclusion that criminal consequences would not follow or that criminal action initiated is always bad in law. The record does not indicate that the FIR has been filed as an arm-twist practice to pressurise and harass the petitioners. What is relevant to note is that the original accused nos.1 and 2 i.e. Mr. Rajeevv Samani and Mr. Mahesh Katter with whom the petitioners are alleged to have entered into criminal conspiracy in committing the offence under Sections 406, 467, 420 read with Section 120(B) have not moved this Court under Section 482 of the Criminal Procedure Code for quashing the very FIR , and taking into consideration this fact, the quashing of the FIR qua the present petitioners would amount to miscarriage of justice, more particularly, when the matter is at the crucial stage of investigation. The case dairy handed over by the learned A.P.P. to the Court for perusal does not indicate in any manner that the FIR lodged is false or malicious, and therefore, the prayer for quashing the complaint cannot be granted. The argument that the Police Officer of Bhavnagar Police Station with whom the FIR is lodged by the complainant has no jurisdiction to investigate the commission of alleged offences as the alleged offences have taken

place at Bombay, and therefore, the FIR should be quashed has no substance. Similarly, the prayer made to transfer the case to Bombay Police cannot be accepted. The averments made in the complaint make it explicit that bank guarantees were furnished and encashed at Bhavnagar pursuant to conspiracy hatched by the accused including the petitioners. Therefore, the Police Officer of the Bhavnagar Police Station is competent to investigate the FIR. Moreover, there is no prayer in the applications to transfer the FIR to the Bombay Police, and therefore, also the question of transferring the FIR to the Bombay Police does not arise. The case diary also indicates that the investigation is carried out without bias, and therefore, the FIR cannot be quashed on the ground that Bhavnagar Police has no jurisdiction to investigate the complaint or that the complaint is required to be transferred to the Bombay Police. Reference in this connection may be had to the decision rendered in the case of Navinchandra N.Majitha vs. State of Maharashtra and others ((2007) 7 SCC 640).

7. The learned Counsel for the petitioner Mr. R.K.Anand has placed reliance on (1) Indian Oil Corporation vs.NEPC India Ltd. & Ors.((2006 6 SCC 736). I am in complete agreement with the proposition laid down therein, however, in my view, the decision supports the case of the respondents rather than the petitioners as, in the present case, as discussed herein above, the allegations in the complaint are sufficient to

constitute offences as alleged therein. (2)Punjab National Bank and Others vs. Surendra Prasad (1993SCC (Cri.)149 wherein there being no dishonest intention or misappropriation, it was held that the complaint does not make out any case much less prima face case, and therefore the complaint came to be quashed. That is not so in the present case as the complaint spells out the ingredients of the offence alleged therein. The ratio of this decision, therefore, cannot be made applicable to the case on hand. (3) Navinchandra N. Majithavs. State of Maharashtra and Ors. ((2007) 7 SCC 640 wherein it has been held in para 37 of the judgment that : “Thus, the power conferred on the High Courts under Article 226 could as well be exercised by any High Court exercising jurisdiction in relation to the territories within which “ the cause of action wholly or in part arises.” In the present case, as discussed above, the bank guarantees were, in fact, furnished and encashed at Bhavnagar, and therefore, part of the cause of action having arisen at Bhavnagar, the Bhavnagar Police has jurisdiction to investigate the complaint. This decision, therefore supports the case of the respondents rather than the petitioners. (4) M/s. Hanuman Prasad Ojha and Ors, vs. State of West Bengal & Ors. (2006 Cri.L.J.2597). The view expressed by me in Navinchandra's case (supra) applies to this decision as well and (5)Thalapalli Raghavaiah vs. State House Officer & Ors. (2007(4) Scale 458 wherein it has been observed that the entire reading of the complaint does not disclose any offence

except a civil dispute between the parties whereas in the present case as observed earlier an action of a party may have civil as well as criminal consequences. Moreover in the present case, the complaint discloses criminal offence and the petitioners are alleged to have entered into a criminal conspiracy , and hence this decision cannot be made applicable to the present case.

8. Learned Counsel Mr. Shethna on the other hand submitted that there is a prospective date of transaction. According to the learned Counsel, the accused no.1 contacted the complainant in February, 2006 and represented that in view of the MOU dated 13-4-2005 entered into between the accused no.1's firm and STC iron ore is to be exported in June 2006 for which bank guarantee is required to be given, even though, in fact, the goods under the said MOU were already exported in June 2005 and the value of the goods was given in advance to the accused no.1. The learned Counsel further submitted that the accused no.3 had asssured the complainant that the representation made by the accused no.1 was true and correct and in that fraudulent manner succeeded in getting the bank guarantees from the complainant which came to be invoked before the maturity. According to the learned Counsel there has been criminal conspiracy amongst the accused as otherwise the accused no.1 alone could not have succeeeded in getting the bank guarantees from the complainant. Learned Counsel next

submitted that the complainant went to Mumbai from Bhavnagar by air. The accused no.1 signed the register of STC Mumbai and also referred to therein that one more person was accompanying. The complainant himself was another person, however, the accused no.3 denies this fact even though fully aware, which shows the guilty mind of the accused no.3. The learned Counsel next submitted that bank guarantees were given with clear understanding with reference to future transaction and not with reference to any transaction in the past, however, the transaction had already taken place in June 2005 when the goods were exported, but by way of false representation that the goods were to be exported in June 2006 and for implementation of the contract of MOU, the bank guarantees were required, the bank guarantees were obtained by the accused by hatching a criminal conspiracy with the accused nos.2, 3, 4 and 5. According to the learned Counsel there is a clear case of criminal conspiracy with dishonest intention to cheat and misappropriate funds. Learned Counsel also submitted that the moneys are misappropriated from Bhavnagar itself, since the bank guarteens are encashed at Bhavnagar, and that prima face the complaint discloses that the offence had taken place within the territorial limits of Bhavnagar Police Station. I find considerable force in these submissions made by the learned Sr.Counsel Mr. Shethna. Lastly, learned Counsel Mr. K.J.Shethna for the respondent no.2 has submitted that the accused no.5

has not played any role in the commission of the alleged offence, however, as stated earlier, the original accused nos.1 and 2 with whom the petitioners are alleged to have entered into criminal conspiracy in committing the alleged offences have not moved this Court, and therefore, the FIR qua the present petitioners cannot be quashed as it would amount to miscarriage of justice. The investigation is at the crucial stage and it is for the investigating Officer at the time of filing charge-sheet to make his report to that effect.

9. Learned Sr. Counsel Mr. Shethna in support of his submission that the complaint cannot be quashed has relied on various decisions, however, I deem it proper to deal with the authorities relevant for the purpose of deciding this application. They are : (1) Parkash Singh Badal and Anr. vs. State of Punjab and Ors. wherein it has been held that, " The ultimate test is whether the allegations have any substance. An investigation should not be shut out at the threshold because a political opponent or a person with political difference raises an an allegation of commission of offence. Therefore, the plea of mala fides cannot be maintained." (2) State of Orissa and another vs. Saroj Kumar Sahoo ((2005) 13 SCC 540 wherein it has been held that where investigation was not completed, it was impermissible for the High Court to look into materials, the accepttibility of which is essentially a matter for trial and that the allegations of mala fides are inconsequent and cannot by

themselves be the basis for quashing the proceedings. (3) State of Punjab through Secretary Home vs. Subhash Kumar & Ors ((2004) 13 SCC 437 wherein it has been held that quashing of FIR by the High Court by entering into the factual arena was wholly impermissible, and (4) K. Hasim v. State of T.N. ((2005) 1 SCC 237 wherein it has been held that for an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done an illegal act, the agreement may be proved by necessary implication.

10. I have carefully examined all these authorities cited by learned Sr. Counsel in light of the submissions canvassed by him and I find that there cannot be any dispute with regard to the ratio laid down in these decisions and that they are squarely applicable to the facts of the case on hand.

11. Viewed in this back ground, I am of the opinion that the petitioners had not made out any case whatsoever which would warrant interference of this Court at this stage, and therefore, it would not be appropriate for this Court to quash the complaint being FIR no.619 of 2006 at A-Division Police Station, Bhavnagar, as also the subsequent proceedings arising therefrom, in exercise of its inherent jurisdiction under Section 482 of the Code. This Court would interfere only in an extraordinary situation where the continuation of criminal proceedings

would result in manifest injustice to the concerned. The process of criminal proceedings once set in motion has to end and culminate in inquiry and trial. The power under Section 482 is an extraordinary power that can be exercised by this Court only to prevent abuse of the process of any Court or otherwise to secure the ends of justice. (See State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC335 : 1992 Cri.L.J.527)

12. Resultantly, both these petitions fail and the same are accordingly dismissed. Rule is discharged. Interim relief granted earlier stands vacated. However, the Investigating Officer-PSI AECS Bhavnagar A-Division Police Station, Bhavnagar, shall dispose of the proceedings in complaint being FIR no.619/2006 registered with A-Division Police Station, Bhavnagar, without being influenced by any of the observations made in this order, as they are confined only for the purpose of disposal of this application.

(M.D.Shah, J.)

After pronouncement of this judgment, learned Counsel Mr. Manish R.Bhatt for the petitioners requested for continuance of the interim relief granted earlier. The request is rejected.

(M.D.Shah,J.)

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